Reserved Judgment

COURT NO.2

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Income Tax Appeal No.115 of 2001
(Old No.119 of 2000)

1. The Commissioner of Income Tax, Meerut
2. Dy. Commissioner of Income Tax (Asstt.), Special Range-1, Dehradun

..... Appts

Versus

ONGC as agent of M/s Halliburton
Offshore Services Inc. Tel Bhawan, Dehradun

..... Respondent

Dated: December 15, 2005

Sri S.K. Posti, Advocate for the appellants.
Sri J.P. Joshi, Advocate for the respondent.

Coram: Hon. P.C. Verma, J.
Hon. J.C.S. Rawat, J.

Per Hon'ble P.C. Verma, J.

This is an income tax appeal under Section 260-A of Income Tax Act, 1961 against the judgment order dated 28.09.1999, passed by the Income Tax Appellate Tribunal, (Delhi Bench 'C' New Delhi) in STA No.17(Del) of 1992 ***(hereinafter will be referred to as the Tribunal),*** whereby the Tribunal has held that the assessee was not liable to Surtax under the Companies (Profits) Surtax Act, 1964, by virtue of exemption available under Notification No.G.S.R. 307(E), dated March 31, 1983 issued under Section 24-AA of the

Companies (Profits) Surtax Act, 1964 (***hereinafter will be referred to as the Act***)

2. The question raised in the Memo of Appeal is being reproduced as under: -

> ***"Whether on the facts and in the circumstances of the case, the Ld. ITAT was legally correct to hold that assessee was not liable to Surtax under the Companies (Profits) Surtax Act, 1964, by virtue of exemption available under Notification No. GSR-307(E) dated 31.03.1983 issued u/s 24-AA of Companies (Profits) Surtax Act, 1964?"***

3. The dispute in the present appeal relates to the Assessment Year 1987-88. The Assessee is non-resident company executing contract with O.N.G.C. The O.N.G.C. has borne the tax-liability on behalf of the non-resident company including the Surtax also. After completing the assessment of the income tax under Section 44-BB of the Income tax Act, the Assessing Authority proceeded to assess the surtax under the provisions of the Act and notice was issued to the assessee O.N.G.C. The assessee filed his written submission claiming exemption of Surtax relying on Notification No.GSR-307(E) Dated 31.03.1983 and pleaded that the Surtax was not leviable on the assessee foreign company.

4. After scrutinizing the contents of contract between the Foreign Company and the O.N.G.C., the Assessing Authority recorded a finding of fact that all the contracts were the service contracts. It is an admitted fact that it is not the case of the assessee even before this Court that it was not a service contract and it was a work contract i.e. *association or participation in any business consisting of the prospecting for or extraction or production of mineral oils.* Accordingly, the Assessing Authority came to the conclusion that the notification-dated 31.03.1983 was not applicable in the case of the

assessee, therefore, the assessee was not exempted by virtue of the said notification. Against this order, the first appeal was preferred by the assessee foreign company before the Commissioner of Income Tax (Appeals) Dehradun. The Commissioner (Appeals) allowed the appeal after relying on the Income Tax Appellate Tribunal's earlier decision wherein on the same facts and circumstances, it was held that the assessee was exempted from the payment of surtax by virtue of Notification No.GSR-307(E) dated 31.03.1983. Against this order of the Commissioner (Appeals), the Revenue preferred a Second Appeal before the Income Tax Appellate Tribunal, Delhi. The learned Income Tax Appellate Tribunal also dismissed the appeal of the Revenue after relying on its earlier decision in the case of ONGC as agent of M/s Griffin Alexander Drilling Co. Vs. Dy. C.I.T., S.T.A No.9(Del)/1990 etc., and it was observed as under: -

"We have considered the rival submissions. We find that this very issue was considered by the Tribunal in the above noted decision where the Tribunal has held that in view of the terms of No. GSR-307(E) dated 31.03.1983 and the letter of ONGC No.0-19011/3/89-ONG/DO dated 02.08.1989 addressed to the Joint Secretary (FTD), Central Board of Direct Taxes, New Delhi. The Government has clarified the ONGC and Oil India Ltd. are persons authorized by the Central Government in the business of prospecting for or extraction or production of mineral oils. Therefore, it was clear that in terms of the aforesaid notification dated 31.03.1983 these foreign contractors of the ONGC were exempted from payment of surtax. Since the facts are same, therefore, respectfully following the decision of the Appellate Tribunal in the assessee's own case for the assessment year 1983-84, no surtax is leviable on the assesses. These appeals are, therefore, allowed and the order of the CIT (Appeals) are set aside."

5. We proceed to examine the aforesaid finding in the light of the provisions of Section 24-AA of the Act and

notification No.GSR-307(E) dated 31.03.1983 and the letter of ONGC No.0-19011/3/89-ONG/DO.1 dated 02.08.1989. Section 24-AA of the Companies (Profits) Surtax Act, 1964 reads as under:-

> ***{24AA. Power to make exemption etc. in relation to participation in the business of prospecting for extraction etc., of mineral oils: - (1) If the Central Government is satisfied that it is necessary or expedient so to do in the public interest, it may, by notification in the official Gazette, make an exemption, reduction in rate or other modification in respect of surtax in favour of any class of foreign companies specified in sub-section (2) or in regard to the whole or any part of the chargeable profits of such class of companies***
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> ***Explanation:- For the purposes of this sub-section, "foreign company" shall have the meaning assigned to it in clause (4) of section 80B of the Income-Tax Act.***
>
> ***(2) The foreign companies referred to in sub-section (1) are the following, namely: -***
>
> ***(a) foreign companies with whom the Central Government has entered into agreement for the association or participation of that Government or any person authorized by that Government in any business consisting of the prospecting for or extraction or production of mineral oils: and***
>
> ***(b) foreign companies providing any services or facilities or supplying any ship, aircraft, machinery or plant (whether by sale or hire) in connection with any business consisting of the prospecting for or extraction or***

production of mineral oils carried on by that Government or any person specified by that Government in this behalf by notification in the official Gazette.}

(3) Every notification issued under this section shall be laid before each House of Parliament.

Explanation- For the purpose of this section, "mineral oil includes petroleum and natural gas."

6. The sub-section (2) of Section 24-AA of the Act refers to the companies referred in sub-clause (1) of Section 24-AA of the Act under which the Government is empowered to exempt the companies from Surtax. The clause(a) of sub-section(2) of Section 24-AA of the Act refers to those foreign companies with whom the Central Government has entered into agreement for *association or participation of that Government* or any person authorized by that Government *in any business consisting of the prospecting for or extraction or production of mineral oils.* Clause (b) of sub-section (2) of Section 24-AA of the Act provides any services or facilities or supplying any ship, aircraft, machinery or plant (whether by way of sale or hire) in connection *with any business* consisting of the prospecting for or extraction or production of minerals oils.

7. A conjoin reading of these two sub-clauses clearly reveals that both these two clauses are the referring to two separate categories of foreign companies. The first category of companies are those companies with which contract is entered into for the association or participation of that Government or any person authorized by that Government in any business consisting of the prospecting for or extraction or production of mineral oils. The second category of companies are those companies with which the contract

is for providing any service or facility or supplying any ship, aircraft, machinery or plant in connection with the work referred in clause (a) of sub-clause(2) of Section 24-AA of the Act. Therefore, the clause(a) of sub-clause(2) of Section 24-AA of the Act refers to a work contract company entered into a contract and clause (b) of sub-clause(1) of Section 24-AA of the Act provides for those companies which have entered into a contract to provide services for work.

8. The notification No.GSR-307(E) dated 31.03.1983 reads as under:-

"Whereas the Central Government is satisfied with it is necessary and expedient in the public interest to make an exemption in respect of surtax in favour of foreign companies with whom the Central Government has entered into agreements for the association or participation of that Government or any person authorized by that Government in any business consisting of the prospecting for or extraction or production of mineral oils;

Now, therefore, in exercise of the powers conferred by section 24AA of the Companies (Profits) Surtax Act, 1964 (7 of 1964), the Central Government hereby provides that no surtax shall be payable by such foreign companies.

Explanation: - For the purpose of this notification:-

- ***(a) "foreign company" shall have the meaning assigned to it in clause (4) of section 80B of the Income Tax Act, 1961 (43 of 1961)"***
- ***(b) "mineral oil" includes petroleum and natural gas.***

9. The exemption provided by the aforesaid notification is only with respect to those categories of the foreign companies, which enter into an agreement for the association or participation in any business consisting of prospecting for or extraction or production of mineral oils. The mineral oil includes petroleum and natural gas also as explained in the explanation appended to Sub-section 24-AA of the Act. As it has been explained in the said notification, the foreign companies have the same meaning as defined under Section 80-B of the Income Tax Act as it stood at the relevant time. Clause-4 of Section 80-B of Income Tax Act defines the foreign companies means a company which is not a domestic company as defined in clause (2). Clause (2) of Section 80-B of the Income Tax Act defines the domestic company means an Indian company, or any other company, which, in respect of its income liable to tax under this Act, has made the prescribed arrangements for the declaration and payment, within India, of the dividends (including dividends on preference shares) payable out of such income.

10. By letter-dated 02.08.1989, the ONGC has been declared to be *"any person authorized by the Government"*. Admittedly, the assessee is a foreign company and had not entered into an agreement for the association or participation in any business consisting of the prospecting for or extraction or production of mineral oils. The Assessing Authority after going through the contract came to the conclusion that it is a service contract and not a contract for the association or participation in any business relating to extraction or production of mineral oils. Even before this Court it is a case of the assessee that they are doing the service with the ONGC. Section 24-AA of the Act itself makes a distinction between the clauses (a) & (b) under Section

24-AA of the Act. The companies referred under Section 24-AA(2)(a) are those companies which entered into a work contract while the companies which are referred under Section 24-AA(2)(b) are those companies which entered into the contract of service. The notification dated 31.03.1983 only covers the companies which have been referred in Section 24-AA(2)(a) of the Act.

11. In view of this admitted position, the assessee is not a company as referred in Section 24-AA(2)(a) of the Act, hence, the assessee is not entitled for the exemption as claimed on the basis of the said notification.

12. Therefore, for the reasons recorded above, the judgments of Income tax Appellate Tribunal as well as of Income Tax Commissioner (Appeals) are hereby set aside and the judgment of the Assessing Authority is upheld. The question is answered in favour of the Revenue and against the Assessee.

(J.C.S. Rawat, J.) **(P.C. Verma, J.)**

Rajeev Dang
15-12-2005.